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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. ~~700~~ 71

UNITED STATES OF AMERICA EX REL.
LONNIE AFFRONTI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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INDEX

Opinions Below 2

Jurisdiction 2

Question Presented 3

Statutes and Constitutional Provisions Involved 3

Statement of the Matter Involved 3

Reasons Relied On for Allowance of Writ 6

Appendix—

Text of Statutes Involved 14

Opinion of U. S. Court of Appeals, Eighth Circuit, Dated April 13, 1955 15

Cases Cited

Casman vs. United States, 303 U. S. 617 (reversed 94 F. 2d 1020) 9

Crow vs. United States, 186 F. 2d 704 (C. C. A. 9th Cir.) 9, 10

Ex parte United States, 1916, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178 Ann. Cas. 1917B, 355 6

Frad vs. Kelly, (1937) 302 U. S. 312 9

Kelley vs. United States, 209 F. 2d 638 5

Kirk vs. United States, 185 F. 2d 185 5

Mann vs. United States, 218 F. 2d 936 5

McNally vs. Hill (Warden), 293 U. S. 131 ..... 9, 10

Pernatto vs. United States, (C. C. A. 9th Cir.) 107 F. 2d 372 7

Phillips vs. United States, 212 F. 2d 327 ..... 2, 5, 10

Stern vs. United States, 219 F. 2d 936 5

United States vs. Greenhaus, (1937) (C. C. A. 2, 1937) 85 F. 2d 116, Certiorari denied 299 U. S. 596 9

United States vs. Murray, 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309 10

U. S. vs. Thompson, 175 F. 2d 140 10

Weber vs. Squire, 124 F. 2d 613 (Cert. denied 62 S. Ct. 800) 6, 9

Weiss vs. United States, 28 F. Supp. 598 7

STATUTES

Rule 19, S. Ct., U. S., Section 1 (b) 2, 3

Rule 35, Federal Rules of Criminal Procedure, Title 18, U. S. C. A. 8

Title 18, U. S. C. A., Notes of Advisory Committee on Rules, Sec. 396 9

Title 18, U. S. C. A. 724, now Title U. S. C. A., Sec. 3651 17

28 U. S. C., Section 1254 (1) 2, 3

28 U. S. C., Section 2101 ..... 2, 3

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Lonnie Affronti, respectfully petitions that a writ of certiorari issue out of this Court to review a final judgment of the United States Court of Appeals for the Eighth Circuit, entered April 13, 1955, at which time said Court affirmed the judgment of the United States District Court for the Western District of Missouri.

In its judgment dated November 18, 1954, the United States District Court for the Western District of Missouri

overruled motion filed by the defendant therein, which motion sought to have the execution of the unserved sentences suspended and the defendant placed on probation for the period of the unserved sentences. The District Court held that it was without jurisdiction to grant the motion following the decision of the United States Court of Appeals for the Eighth Circuit in *Phillips* v. *United States*, 212 F. 2d 327, rendered April 13, 1954.

OPINIONS BELOW.

The opinion of the District Court is printed in the record filed herein (R. 14). The opinion of the Court of Appeals has not been officially reported but follows page 21 of the Record filed herein.

JURISDICTION.

The opinion of the United States Court of Appeals for the Eighth Circuit was filed April 13, 1955. No petition for rehearing being filed the judgment became final. An order was made by that court staying the mandate until May 20, 1955, pending the filing of this petition for writ of certiorari.

Jurisdiction to review this case upon writ of certiorari is conferred upon this court by 28 U. S. C., Section 1254 (1) and 28 U. S. C., Section 2101, and Rule 19 of Supreme Court of the United States, Section 1 (b):

> (b) "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; * * *."

QUESTION PRESENTED.

The question presented by this petition is:

Does a District Court have the power to grant probation with respect to unserved portions of a cumulative sentence?

The opinion in this case recommends that the appellant be permitted to apply to this court without the prepayment of clerk's fees in the Court of Appeals.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

This case involved the following statutes:

28 U. S. C., Section 1254 (1).
28 U. S. C., Section 2101.
Rule 19, S. Ct. U. S., Section 1 (b).

STATEMENT OF THE MATTER INVOLVED.

Petitioner filed a motion in the District Court to stay the execution of the sentences yet not served.

On the 26th day of January, 1944, the petitioner, having been adjudged guilty of the charges against him in an indictment returned in that District, received the following sentences (R. 6):

> "The defendant having been convicted on verdict of guilty of the offenses in counts two, three, four, five, six, seven, eight, nine and ten of the Indictment in the above-entitled cause, to wit: unlawfully, knowingly and feloniously sell morphine, a derivative of opium, not from the original stamped package and not in the original stamped package and upon which

the tax had not been paid as required by law, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years on each of counts two, three, four, five, six, seven, eight, nine and ten of the Indictment; the sentence imposed on count three to begin to run at the expiration of the sentence imposed on count two; the sentence imposed on count four to begin to run at the expiration of the sentence imposed on count three; the sentence imposed on count five to begin to run at the expiration of the sentence imposed on count four; the sentence imposed on count six to begin to run at the expiration of the sentence imposed on count five; the sentence imposed on count seven to begin to run at the expiration of the sentence imposed on count six; the sentence imposed on count eight to begin to run at the expiration of the sentence imposed on count seven; the sentence imposed on count nine to begin to run at the expiration of the sentence imposed on count eight, and the sentence imposed on count ten to begin to run at the expiration of the sentence imposed on count nine; the sentence herein imposed on count two to begin to run at the expiration or termination of the sentence imposed by the Circuit Court of Ray County, Missouri, which the defendant is now serving in the Missouri State Penitentiary; the execution of the sentences imposed on counts six, seven, eight, nine and ten is suspended and the defendant is placed on probation under the usual conditions, for the period of twenty five (25) years; the probation herein granted to begin to run at the expiration of the sentences imposed on counts two, three, four and five, or until said defendant is

otherwise discharged as provided by law without costs."

The petitioner commenced the service of the sentences aforesaid on October 14, 1949 (R. 20).

The motion filed in the District Court on July 14, 1953, seeking to have the execution of the remaining sentences suspended and the petitioner placed on probation, was filed during the service of the first of the five year sentences, leaving at that time three of the five year sentences to be served.

Previous to the ruling on the motion aforesaid, the United States Court of Appeals had affirmed the United States District Court for the Western District of Missouri in *Melvin H. Phillips, Appellant, v. United States of America, Appellee*, 212 F. 2d 327. As in this case, Judge Collet filed a dissenting opinion. The facts in that case are identical with those in this case.

Due to the conflict of that opinion with the opinion by the United States Court of Appeals for the Ninth Circuit in *Kirk* v. *United States*, 185 F. 2d 185, the Court in the Phillips case recommended that the defendant Phillips might petition for certiorari without the prepayment of clerk's fees or costs in that court. Defendant Phillips did not apply for certiorari to this court.

Since the Phillips and the Kirk cases, the United States Court of Appeals for the Tenth Circuit, in *Kelley* v. *United States*, 209 F. 2d 638, has followed the ruling of the Ninth Circuit in the Kirk case. We find that the Phillips decision has been followed by the Fourth Circuit in *Stern* v. *United States*, 219 F. 2d 263, and *Mann* v. *United States*, 218 F. 2d 936.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The question presented in this petition has reached four different circuits in the United States Court of Appeals, but has not been passed upon by this court.

The Fourth Circuit and the Eighth Circuit are in agreement and the contrary opinion finds an agreement between the Ninth and the Tenth Circuits.

It is conceivable that prisoners serving time in the same institution from different districts might be treated differently due to rulings of the Courts of Appeals in which their districts are located. The petitioner, Affronti, now confined to the United States Medical Center for Federal Prisoners, at Springfield, Missouri, has been told that the United States District Court for the Western District of Missouri cannot entertain his motion in which he seeks to have the execution of the sentences yet to be served suspended, whereas a cell mate whose district is in either the Ninth or Tenth Circuits could have such a motion sustained.

In order to reach a clear understanding of the problem presented in this petition, it is necessary to review the jurisdiction of the sentencing courts to suspend or place on probation persons convicted before them. The Circuit Court of Appeals, Ninth Circuit, recognized the importance of such a step in *Weber* v. *Squire*, 124 F. 2d 618 (Cert. denied 62 S. Ct. 800), when it stated the following:

> "To understand the issue it will be well to recall that power of the District Court to suspend sentences and to release a convicted person under probation, although long assumed by the U. S. District Courts, was held without basis in law by *Ex parte United States*, 1916, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178 Ann. Cas. 1917B, 355.

"Thereafter a probationary system for U. S. Courts became law by the Act of March 4, 1925, c. 521, 43 Stat. 1259, 18 U. S. C. A., Sec. 724."

Thus, Congress, when shown a graphic illustration of the need for legislation granting the courts further jurisdiction and powers of probation by the decision in *Ex parte United States, supra*, enacted Title 18, U. S. C. A. 724, now Title U. S. C. A., Sec. 3651, which reads, in part, as follows:

"Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition of execution of sentence and place the defendant on probation for such period and upon such terms and condtions as the court deems best."

The federal courts have, in many instances, interpreted the foregoing legislation in regard to the question of what limitations of time are to be placed on the courts in exercising their jurisdiction under the Act. The following quotation from *Pernatto* v. *United States*, (C. C. A., 9th Cir.) 107 F. 2d 372, best outlines the court's interpretation of the Act in respect to time. Quoting from the case of *Weiss* v. *United States*, 28 F. Supp. 598, the Court of Appeals in the *Pernatto case, supra*, stated:

"It will be observed that the power to suspend the execution of sentence given by the act is not expressly limited to the time of imposition of sentence or to the term within which sentence is imposed. On the contrary, it seems clear that it was the intention of the Congress in enacting this remedial and humanitarian legislation that the power to suspend the execution of a sentence should continue until its execution has actually commenced. It has been so held by all four

Circuit Courts of Appeals in which the question has arisen. *Nix* v. *James*, 9 Cir., 7 F. 2d 590; *Kriebel* v. *United States*, 7 Cir., 10 F. 2d 762; *Evans* v. *District Judge*, 6 Cir., 12 F. 2d 64; *Ackerson* v. *United States*, 2 Cir., 15 F. 2d 268. It is true that the Supreme Court held in *United States* v. *Murray*, 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309, that the power is gone once execution of the sentence commences. It was not suggested in that case, however, that the power must be exercised at the time of imposition of sentence or within the term. On the contrary Chief Justice Taft took occasion to point out that the rulings of the four Circuit Courts of Appeals to which I have referred were not inconsistent with his opinion.

"It must be remembered, as Judge Anderson pointed out in *Kriebel* v. *United States, supra*, that the rule laid down in *United States* v. *Mayer*, 235 U. S. 55, 35 S. Ct. 16, 59 L. Ed. 129, to the effect that a federal district court has no power to set aside or alter a sentence after the expiration of the term at which it was imposed, unless the proceeding for that purpose was begun during that term, does not apply to an application to suspend the execution of a judgment. This is for the reason, as was held in *United States* v. *Pile*, 130 U. S. 280, 9 S. Ct. 523, 32 L. Ed. 904, that an order suspending the execution of a sentence does not operate to set it aside. Under such circumstances the sentence remains in full force, its execution merely being suspended."

Note the distinction made in the above-quoted opinion between altering or setting aside and suspending execution of sentences.

It is extremely important to keep the distinction between altering or setting aside and suspending in mind. Rule 35 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A., deals with correction or reduction of sentence, but its very title and substance and its purpose is to

introduce a "flexible time limitation on the power of the court to reduce a sentence, in lieu of the present limitation of the term of court." Title 18, U. S. C. A., Notes of Advisory Committee on Rules, Sec. 396.

> "A prisoner serving the first of several consecutive sentences is not serving the other sentences."
>
> *McNally* v. *Hill (Warden)*, 293 U. S. 131.
>
> *Crow* v. *U. S.*, 186 F. 2d 704 (C. C. A. 9th Cir.).

The above point is the focal point of the argument.

Originally the Supreme Court of the United States took the position in *United States* v. *Greenhaus*, (1937) (C. C. A. 2, 1937) 85 F. 2d 116, Certiorari denied 299 U. S. 596, that where consecutive sentences were imposed upon different counts of the same indictment, the court could not grant probation and suspend execution of sentence conditional upon the execution of a prior sentence. However, in the same year, a case from the *same* circuit based on the same facts, the Supreme Court held that the District Court, under the Probation Act, had the power to suspend the imposition of sentence on one indictment and grant probation for a period to begin upon completion of execution of sentence on another indictment before the court at the same time. *Frad* v. *Kelly*, (1937) 302 U. S. 312.

Thereafter, in the case of *Casman* v. *U. S.*, 303 U. S. 617, the Supreme Court reversed the Circuit Court of Appeals for the 2nd Circuit (94 F. 2d 1020), which has decided the case on the authority of the *Greenhaus case, supra*, on the grounds of *Frad* v. *Kelly, supra.*

Subsequently, in *Weber* v. *Squier, supra*, the court, at page 621, stated:

> "Since the doctrine of the Greenhaus case appears to be overruled and disapproved there was nothing wrong with the District Court's order in the instant

case in sentencing petitioner to the penitentiary upon one count and at the same time sentencing him and suspending sentence under a period of probation under another count of the same indictment."

Herein lies the distinction between the case of *United States* v. *Murray, supra,* and *Bradford* v. *U. S., supra,* and this case. In the instant case we have nine separate sentences and nine separate counts. In the *Murray case, supra,* there was a single sentence upon which service had commenced, and the issue decided in that case was that a district judge cannot place a prisoner on probation after service of his sentence has begun. The petitioner herein is presently serving the sentence on Count 3 of the indictment. The motion which the District Court denied, asking for suspension of sentences in the instant case, goes to the sentences imposed on Counts 4 and 5, not the sentence being served presently under Count 3.

The *Bradford case, supra,* dealt with the question of the right to change a sentence *after* service thereof had commenced, which question was labeled unauthorized in the *Murray case, supra,* and has no bearing on the case at bar.

Thus we close the circle, arriving at our principal point, namely, "A prisoner serving the first of several consecutive sentences is not serving the other sentences." *Cran* v. *U. S., supra; McNally* v. *Hill, supra, U. S.* v. *Thompson,* 175 F. 2d 140.

In his dissenting opinion in the *Phillips Case,* Judge Collet said, 212 F. 2d 327):

"It is suggested that the revisers of Title 18 of the Code did not intend that the functions of the judiciary relating to probation should overlap or conflict with the functions of the executive branch of the govern-

ment with reference to custody and good time. The inference appears to be that from the revision should be read into the law a purpose to limit the long-established practice of pronouncing separate sentences for the purpose of reserving jurisdiction to suspend one or more later if the facts warrant. But, as stated in *Kelley* v. *United States*, 209 F. 2d 639 (10 Cir.), decided January 27, 1954, wherever a substantive change was intended by the revision, the reviser's notes so indicate. The reviser's notes indicate that there was no intention to change the power of the courts to suspend sentence and grant probation at any time before the service of the sentence begins. *Kirk* v. *United States*, 185 F. 2d 185 (9 Cir.); *Kelley* v. *United States*, *supra*. Hence, the crux of the present question is whether sentences which are separate and distinct at the time of original sentence automatically and irrevocably become one indivisible general sentence immediately upon the commencement of the service of the first. Or, as stated in the majority opinion, do the sentences, conceded to be separate and several at the time of imposition for purposes of probation, become 'for purposes of custody, the exact equivalent of a general sentence of imprisonment for the same number of years'? To warrant that assumption it is necessary to assume that the power of probation is abruptly and automatically shut off by incarceration on an antecedent sentence and custody is the only remaining function to be performed. That assumption is not sound, yet it is made the ground for denying any remaining power in the courts over sentences not yet begun. That, of course, is the exact purpose and effect of the majority opinion. But it seems to me that to give the Act such a narrow construction is unwarranted and not consistent with recognized rules of statutory construction of remedial legislation.

And it is to be said that the retention of the power later to suspend a sentence the execution of which has not yet begun, will cause harassment of the District Courts the answer is that those courts may, in a case

free from doubt as to the proper duration of imprisonment, impose a general sentence on all counts and forever bar any application for suspension and probation as to any part after its service has begun. But if the court is in doubt, and that must inevitably be the case in many instances, it should have the power, as it has been done in the past, to pronounce separate sentences of imprisonment and thereby reserve the power later to suspend one or more, the service of which has not yet begun. In the latter cases the District Courts have the absolute discretion to hear or not to hear applications for probation with or without the presence of the defendant. And their refusal or consent to do so, and their action in granting or refusing to grant probation on the merits of each case, are not subject to appellate compulsion or review. *United States* v. *Williams*, 12 F. 2d 65.

The original Probation Act by implication and the amended Act explicitly give the power to the courts to pronounce separate sentences. Under the original Act, the power and jurisdiction of the courts over probation extend to the time of the beginning of the execution of the several sentences. That power is not changed by the revision. Probation is by statute a judicial, not an executive function. There is nothing in the original Act or the revised Code which indicates a legislative intent automatically to divest the courts of jurisdiction over probation as to a sentence not commenced, when the custody of a defendant is vested in the executive on another sentence. And there is nothing in the Code which requires a merger of all sentences into one and a figurative transfer of jurisdiction over probation from the courts to the penal authorities as to sentences not yet commenced. In my opinion the majority opinion does that, without legislative sanction."

From the foregoing it is clear that there is an irreconcilable conflict in the decisions of the four Circuits.

Wherefore, your petitioner respectfully prays that, for the reasons herein set forth, a writ of certiorari be issued

to the United States Court of Appeals for the Eighth Circuit to the end that this case may be reviewed and determined by this Court, that the judgment of said Court of Appeals may be reversed by this court; and that your petitioner may have such other and further relief in the premises as may seem just and propr.

Lonnie Affronti,
Springfield, Missouri,
Petitioner.

HARRY F. MURPHY,
806 Commerce Building,
Kansas City, Missouri,
Attorney for Petitioner.

APPENDIX.

Text of Statutes Involved.

28 U. S. C. Section 1254.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U. S. C., Section 2101:

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court, on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.

Rule 19 U. S. Supreme Court, Section 1 (b):

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter * * *."

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,220.

Lonnie Affronti, Appellant, vs. United States of America, Appellee.	Appeal from the United States District Court for the Western District of Missouri.

[April 13, 1955.]

Harry F. Murphy filed brief for Appellant.

Edward L. Scheufler, United States Attorney, and Kenneth C. West, Assistant United States Attorney, filed brief for Appellee.

Before SANBORN, COLLET and VAN OOSTERHOUT, Circuit Judges.

SANBORN, Circuit Judge.

The United States District Court for the Western District of Missouri on January 26, 1944, upon the verdict of a jury finding the appellant guilty upon nine counts of a ten-count indictment charging illegal sales of narcotics, entered a judgment sentencing him to five years imprisonment under each of the nine counts, the sentences to be served consecutively. The judgment provided that he was to serve four of the five-year periods of imprisonment commencing after the termination of a sentence he was then serving in the Missouri State Penitentiary. The execution of the sentences imposed by the judgment under

five of the nine counts of the indictment was suspended, and as to those sentences the appellant was placed on probation for the period of twenty-five years, the probation to commence after he had served the sentences execution of which was not suspended. He appealed from this judgment, which was affirmed by this Court in October of 1944. 145 F. 2d 3.

The appellant was, on October 13, 1949, released from the Missouri State Penitentiary and transferred to the United States Penitentiary at Leavenworth, Kansas, in execution of the judgment of the federal District Court, and has been in federal executive custody ever since.

In July of 1953 the appellant filed a motion in the District Court, stating that the service of the first of the five-year sentences or periods of imprisonment he was required to serve would soon be completed, and asking that the execution of the remaining unserved sentences or periods of imprisonment be suspended, and that he be placed on probation.

The judge who had sentenced the appellant was no longer a member of the District Court. The motion was heard by Chief Judge Duncan of that court. In denying the motion, he said:

> "In his motion the defendant contends that unless he is placed on probation for the remainder of the sentences imposed by this court, that he will not be eligible for release until November 26, 1962; further that his prison record is without blemish; that the interests of society have been served by the long period of confinement which has been imposed upon him, and that the best interests of justice will be served by placing him on probation for the remainder of the term of his sentences.

"It had been the custom of this court until *Phillips* v. *United States*, 8 Cir., 212 F. 2d 327 (decided May 4, 1954), in instances where, in the opinion of the court the best interests of justice would be served, to suspend the execution of a sentence, the service of which had not yet begun and place the defendant on probation for the remainder of such term, notwithstanding the fact that such defendant had begun the service of a sentence on a prior count imposed at the same term as the sentence which was later suspended.

"Before the decision in *Phillips* v. *United States*, *supra*, apparently the courts in the Ninth and Tenth circuits had determined that such action was within the right of the court, but of course, the opinion in the *Phillips* case is binding upon this court. *Kirk* v. *United States*, 9 Cir., 185 F. 2d 185; *White* v. *Steigleder*, 10 Cir., 37 F. 2d 858."

We are now urged by counsel for appellant to overrule our decision in *Phillips* v. *United States*, 212 F. 2d 327, and to follow the opinion of the Court of Appeals for the Ninth Circuit in *Kirk* v. *United States*, 185 F. 2d 185, which was relied upon in *Kelley* v. *United States*, 10 Cir., 209 F. 2d 638, and which he assures us correctly states the applicable law. While we regret that the *Phillips* case did not reach the Supreme Court on certiorari, nothing has been brought forward by the appellant which tends in any way to indicate that this Court's decision in the *Phillips* case was incorrect.

As strongly indicating that the *Phillips* case was correctly decided, we note that Judge Chestnut, of the United States District Court for the District of Maryland, recently in two cases gave careful consideration to the question of the power of a District Court to grant a federal prisoner probation with respect to unserved portions of a cumulative sentence which was being served, *United States* v. *Stern*, 123 F. Supp. 118, 125, and *United States* v. *Ber-*

nett (*United States* v. *Mann*), 123 F. Supp. 841, 844-847, and reached the same conclusion that was reached by this Court in the *Phillips* case,—declining, as this Court did, to follow the decision of the Ninth Circuit in the *Kirk* case. An appeal was taken to the Court of Appeals for the Fourth Circuit in each of the cases decided by Judge Chestnut. and his decisions were affirmed. *Stern* v. *United States*, 4 Cir., ____ F. 2d ____, opinion filed February 2, 1955, and *Mann* v. *United States*, 4 Cir., 218 F. 2d 936.

The decision of this Court in the *Phillips* case is adhered to. It calls for the affirmance of the order appealed from.

The appellant may apply to the Supreme Court for certiorari without prepayment of further Clerk's fees or costs in this Court.

The order appealed from is affirmed.

COLLET, Circuit Judge, dissents for the reasons stated by him in his dissenting opinion in the case of *Phillips* v. *United States*, 212 F. 2d 327, 336.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.